

2010 WL 9547005 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Southeast District (Norwalk)
Los Angeles County

Gerald DESJARDINS, by and through his Guardian ad Litem, Paul Desjardins, Plaintiff,

v.

ROSE VILLA HEALTHCARE CENTER, Bell Villa Care Associates, LLC,
European Christian Care, and Does 1 through 200, Inclusive, Defendants.

No. VC055553.
April 19, 2010.

Action Filed: February 8, 2010

Trial Date: None Set

Hearing:

Date: Wednesday, June 9, 2010

Time: 8:30 a.m.

Place: Dept. C

**Notice of Demurrer and Demurrer of Defendants European Christian Care and George Dogar
to Plaintiffs' Complaint; Supporting Memorandum (Code of Civil Procedure 430.10, 430.50)**

Joel F. Citron, Esq., State Bar No. 35879, Katherine A. Tatikian, Esq., State Bar No. 142665, Citron & Citron, 3420 Ocean Park Boulevard, Suite 3030, Santa Monica, CA 90405, Telephone: (310) 450-6695, Facsimile: (310) 450-3851, Attorneys for Defendants European Christian Care and George Dogar.

Assigned for All Purposes to: Honorable Raul A. Sahagun, Dept. SE-F.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, June 9, 2010, at 8:30 a.m., or as soon as the matter may be called before Department C of the above-entitled Court, located at 12720 Norwalk Boulevard, Norwalk, California 90650-3188, Defendants EUROPEAN CHRISTIAN CARE and GEORGE DOGAR will demurrer to the (1) first cause of action for “Elder Abuse/Neglect,” (2) second cause of action for “Willful Misconduct” and (3) third cause of action for “Negligence” by Plaintiff GERALD DESJARDINS, by and through his Guardian ad Litem, PAUL DESJARDINS, against these Defendants in Plaintiffs' Complaint. The grounds for this demurrer are that: (1) Complaint's attempted first, second and third causes of action fail to allege facts constituting a cause of action against Defendants EUROPEAN CHRISTIAN CARE and GEORGE DOGAR (Code Civ. Proc. §§ 430.10(e), 430.50), and (2) that Plaintiff's attempted causes of action are fatally uncertain. Code Civ. Proc. §§ 430.10(f), 430.50.

Defendants' demurrer will be based on (1) this notice, (2) the attached demurrer and memorandum of points and authorities, (3) the concurrently filed notice of motion, motion to strike and memorandum of points and authorities, (4) the Complaint filed on February 8, 2010, (5) matters of which this Court may take judicial notice, (6) all other pleadings and papers on file in this action and (7) the oral argument at the hearing of this demurrer.

CITRON & CITRON

By

JOEL F. CITRON

KATHERINE A. TATIKIAN

Attorneys for Defendants **EUROPEAN CHRISTIAN CARE** and **GEORGE DOGAR**

Dated: April 19, 2010

**DEMURRER TO OF DEFENDANTS EUROPEAN CHRISTIAN
CARE AND GEORGE DOGAR TO PLAINTIFF'S COMPLAINT**

1. The first cause of action for “**Elder Abuse**/Neglect” in the Complaint fails to allege facts constituting a cause of action against Defendants EUROPEAN CHRISTIAN CARE and GEORGE DOGAR. *Code Civ. Proc.* §§ 430.10(e), 430.50.
2. The first cause of action for “**Elder Abuse**/Neglect” in the Complaint is uncertain. *Code Civ. Proc.* §§ 430.10(f), 430.50.
3. The second cause of action for “Willful Misconduct” in the Complaint fails to allege facts constituting a cause of action against Defendants EUROPEAN CHRISTIAN CARE and GEORGE DOGAR. *Code Civ. Proc.* §§ 430.10(e), 430.50.
4. The second cause of action for “Willful Misconduct” in the Complaint is uncertain. *Code Civ. Proc.* §§ 430.10(f), 430.50.
5. The third cause of action for “Negligence” in the Complaint fails to allege facts constituting a cause of action against Defendants EUROPEAN CHRISTIAN CARE and GEORGE DOGAR. *Code Civ. Proc.* §§ 430.10(e), 430.50.
6. The third cause of action for “Negligence” in the Complaint is uncertain. *Code Civ. Proc.* §§ 430.10(f), 430.50.

CITRON & CITRON

By:

JOEL F. CITRON

KATHERINE A. TATIKIAN

Attorneys for Defendants **EUROPEAN CHRISTIAN CARE** and **GEORGE DOGAR**

Dated: April 19 2010

MEMORANDUM IN SUPPORT OF DEMURRER

I. INTRODUCTION

Paul Desjardins brings this lawsuit as Guardian ad Litem on behalf of his brother Gerard Desjardins (“Plaintiff”). Plaintiff directs three attempted causes of action for **Elder Abuse**/Neglect, Willful Misconduct and Negligence against European Christian Care (“Christian Care”), and George Dogar, who was named as a “Doe” Defendant. The Complaint alleges that Christian Care is a “Residential Care Facility as defined in *Health & Safety Code section 1569 et seq.*” [14, 5:4-6]; therefore, it is not a medical

facility. Christian Care was allegedly one of Plaintiff's "care custodians" as defined by [Welfare & Institutions Code §15610.17](#). [C ¶17, 5:20-21] The Complaint alleges no facts whatsoever regarding Mr. Dogar.

II. STATEMENT OF FACTS

Plaintiff allegedly resided at Christian Care from September 2003 until February 6, 2008 when he was admitted to Lakewood Regional Medical Center. [C ¶19, 6:14-15] The Complaint alleges that those persons who provided services to Plaintiff at Christian Care had a duty to provide the care, and to require those under their supervision to provide the care, mandated by [Health & Safety Code §§ 1569, et seq.](#) and Title 22 of the *California Code of Regulations*. [C ¶15, 5:8-12]

On February 6, 2008, the 82 year old Plaintiff was admitted to Lakewood Regional Medical Center where he was diagnosed with numerous health problems. [C ¶19, 6:14-21] After he was discharged from Lakewood on February 12, 2008, he became a patient at Defendant Rose Villa Healthcare Center. [C ¶20, 6:23-24] Although no specific facts are alleged regarding Plaintiff's stay at Christian Care and no facts whatsoever are alleged as to George Dogar or the reasons for including him as a Defendant in this action, Plaintiff seeks to impose liability for his health problems on Defendants, including Christian Care and Mr. Dogar. [C ¶21, 7:9-14]

Based on its Legislative History and well-reasoned California Court of Appeal opinions, no independent cause of action exists under the **Elder Abuse** Act, which is a remedial statute. Even if an independent cause of action existed under the **Elder Abuse** Act, Plaintiff has not met the pleading requirements for recovery pursuant to it. Nor has Plaintiff met the pleading requirements imposed by California law for pleading a cause of action for "Willful Misconduct" and/or "Negligence" against Christian Care and/or Mr. Dogar.

III. PLAINTIFF HAS NOT, AND CANNOT, PLEAD A CAUSE OF ACTION FOR "**ELDER ABUSE/NEGLECT**" AGAINST CHRISIAN CARE OR GEORGE DOGAR.

A. No Independent Cause Of Action Exists Under The **Elder Abuse** Act — [Welfare & Institutions Code §§15600, et seq.](#)

Well reasoned opinions of the Second Appellate District, Division Four, in [Berkley v. Dowds](#) (2007) 152 Cal.App.4th 518, 529, and the First Appellate District, Division Three, in [ARA Living Centers-Pacific, Inc. v. Sup.Ct.](#) (1993) 18 Cal.App.4th 1556, 1563-1564 (cited with approval in [Delaney v. Baker](#) (1999) 20 Cal.4th 23, 33) have held that the **Elder Abuse** Act does not create a separate, independent cause of action, but provides enhanced remedies including punitive damages and attorney's fees when its provisions apply.

[Delaney, supra](#), 20 Cal.4th at 33, explained that the **Elder Abuse** Act's Legislative History demonstrates its remedial purpose: "As was stated in the Senate Rules Committee's analysis of Senate Bill No. 679, 'in practice, the death of the victim and the difficulty in finding an attorney to handle an **abuse** case where attorneys fees may not be awarded, impedes many victims from suing successfully. [P] THIS BILL WOULD ADDRESS THE PROBLEM BY:... authorizing the court to award attorney's fees in specified cases; [and by] allowing pain and suffering damages to be awarded when a verdict of intentional and reckless **abuse** was handed down after the **abused elder** dies.' (Sen. Rules Com., Analysis of Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended May 8, 1991, p. 3.)" *Id.*

"**Elder Abuse** Act's goal was to provide heightened remedies for, as stated in the legislative history, 'acts of egregious **abuse**' against **elder** and dependent adults." *Id.* at 35.

Thus, the purpose of the **Elder Abuse** Act is similar to the purpose of the punitive damages statute [Civil Code §3294](#) - to provide additional remedies for specific egregious conduct.

Although the Second Appellate District, Division Five, in *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 665, concluded that, contrary to *Berkley v. Dowds*, the Act does create an independent cause of action, that interpretation contravenes the Act's Legislative History and intent. No provision of the Act purports to provide an independent cause of action. Like *Civil Code § 3294*, *Welfare & Institutions Code § 15657*, clearly applies to “remedies,” including punitive damages and attorney's fees, which are only recoverable:

“[w]here it is proven by clear and convincing evidence that a defendant is liable for... neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this **abuse**...”

Following *Berkley* and ARA, on September 23, 2009, the Northern District of California concluded in *Guerard v. CNA Financial Corp.* (N.D.Cal. Sep 23, 2009) 2009 WL 3152055¹:

“As an initial matter, plaintiffs sixth cause of action under the **Elder Abuse** Act fails because **there is no separate cause of action for abuse under the Elder Abuse Act. The Act merely creates an additional remedy** under certain, specifically delineated circumstances. *Berkley v. Dowds*, 152 Cal.App.4th 518, 61 Cal.Rptr.3d 304 (2007); *ARA Living Centers-Pacific, Inc. v. Superior Court*, 18 Cal.App.4th 1556, 1563-64, 23 Cal.Rptr.2d 224 (1993). Because all of plaintiffs' claims must be dismissed, this claim must also be dismissed.

“Plaintiffs' claim also fails because plaintiffs have not alleged facts sufficient to establish their right to any remedy allowed under the **Elder Abuse** Act. *Covenant Care, Inc. v. Superior Court*, 32 Cal.4th 771, 790. As discussed above, Ms. Garat's claim for benefits was properly denied based on the conspicuous and ambiguous Home Care Benefit Exclusions provision in her long term care policy. See, e.g., *Berkley v. Dowds*, 152 Cal.App.4th 518, 529, 61 Cal.Rptr.3d 304 (2007). Therefore, no act of financial **elder abuse** or violation of *Welfare & Institutions Code* section 15610.30 is stated.” *Id.* at *6.

Defendants request that this Court follow the well-reasoned opinions in *Berkley*, *ARA* and *Guerard*, and dismiss Plaintiff's “**Elder Abuse**—Neglect,” on the grounds that the Act does not create an independent cause of action. However, as discussed below, even if the Act had created an independent cause of action, Plaintiff has not alleged facts sufficient to entitle him to recover pursuant to it.

B. Even If The Act Had Provided An Independent Cause Of Action, Plaintiff Has Not Plead With The Essential Elements Required To Recover Under It.

1. Plaintiff Has Not Pled “Neglect” As Defined By Welfare & Institutions Code §15657.

Claims for recovery of the remedies provided by the **Elder Abuse** Act are rooted in severely egregious conduct - conduct far more egregious than even professional medical negligence or malpractice. *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 777; *Little Co. of Mary Hospital v. Superior Court* (2008) 162 Cal.App.4th 261, 265. The Act does not apply to simple or even to gross negligence. *Covenant*, supra, 32 Cal.4th at 785. Liability sufficient to allow imposition of the remedies under the Act is limited to “especially egregious **elder abuse**,” proven by the elevated standard of “clear and convincing evidence.” *Covenant*, supra, 32 Cal.4th at 779; *Welf & Inst. Code* §15657.

To establish a claim for recovery of remedies for **Elder Abuse**/Neglect pursuant to *Welfare & Institutions Code* §§ 15610, et seq., Plaintiff must plead facts showing that Defendants: (1) subjected an **elder** to “neglect” as defined by § 15610.57 and (2) acted with recklessness, malice, oppression, or fraud in the commission of that neglect. *Welf. & Inst. Code* §15657. In addition, Plaintiff must plead the essential element of causation. *Perlin*, supra, 163 Cal.App.4th at 664. Because **elder abuse** is statutory,

Plaintiff must plead all the required elements with specificity. *Covenant, supra*, 32 Cal.4th at 790; see also *Delaney, supra*, 20 Cal.4th at 32 (“a claim under the **Elder Abuse** Act must be alleged with particularity”). To recover the remedies provided by the Act, Plaintiff must show that these elements exist by clear and convincing evidence.

Plaintiff alleges in factually devoid, boilerplate terms that Christian Care's conduct “constituted statutory neglect of GERARD DESJARDINS as defined by *Welf & Inst. Code §15610.57*.” [C 1¶29, 9:19-23] A demurrer does not admit such conclusions of law. *Faulkner v. Cal. Toll Bridge Authority* (1953) 40 Cal.2d 317, 329 (allegations that a Defendant's acts were “arbitrary, capricious, fraudulent, wrongful and unlawful, constitute mere conclusions of law which are not to be deemed admitted by a demurrer”). The Complaint does not make any specific allegation as to Defendant George Dogar.

Welfare & Institutions Code § 15610.57 defines “Neglect” to mean: “(1) The negligent failure of any person having the care or custody of an **elder** or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” Plaintiff does not plead “Neglect” with the specificity required by *Covenant, supra*, 32 Cal.4th at 790. Instead of basing his cause of action on specific facts, he alleges in vague, conclusory language that Christian Care and Doe Defendants, including Dogar: (1) “fail[ed] to establish and implement policies and procedures as mandated by state laws,” (2) “fail[ed] to reprimand and/or dismiss employees who were not adequately qualified to provide care to residents in their custodial care,” (3) failed] to sufficiently train and retrain their employees as mandated by law” and (4) “fail[ed] to take other reasonable actions to ensure that the **elderly**/dependent residents in their care and custody, including GERARD DESJARDINS, were not neglected or **abused** in violation of the **Elder/Dependent Adult Abuse/Neglect Act**.” [C 131, 10:1-9] Based on such allegations, Plaintiff has not pled the “neglect” which is an essential element of a claim under the **Elder Abuse** Act. In a similar case, *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 522, 529-530, *rev. denied* (2007 Cal. LEXIS 10115 (Cal. Sept. 19, 2007), affirmed an order sustaining a demurrer to an **elder abuse** claim without leave to amend based on Plaintiff's failure “to allege facts describing the injury suffered or the acts or omissions negligently performed, or showing how the acts or omissions were the proximate cause of the injury.” See also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (Plaintiffs contentions, deductions, or conclusions of fact or law should not be considered in determining whether Plaintiff has pled facts sufficient to constitute a cause of action).

2. Plaintiff Has Not Pled Facts Which Show That Defendants' Conduct Was Reckless, Oppressive, Fraudulent Or Malicious.

a. Plaintiff Has Not Pled The Required Egregious Acts Of Misconduct Required For Recovery Under The Act.

The Legislature intended the Act “to sanction only egregious acts of misconduct” (*Covenant, supra*, 32 Cal.4th at 784), expressly excluding ordinary negligence claims from recovery under it. *Welf. & Inst. Code §15657.2*; *Covenant, supra*, 32 Cal.4th at 789; *Delaney, supra*, 20 Cal.4th at 30. To obtain the Act's heightened remedies, including attorney fees, costs and punitive damages, the alleged “neglect” must be done with recklessness, oppression, fraud, or malice. *Welf. & Inst. Code § 15657*. “Intentional egregious acts of misconduct,” which are “essentially equivalent to conduct that would support recovery of punitive damages” are required for recovery. *Covenant, supra*, 32 Cal.4th at 781, 784, 789.

b. Plaintiff Has Not Pled Recklessness.

“Recklessness” is a “conscious choice of a course of action with knowledge of the serious danger to others involved in it.” *Delaney, supra*, 20 Cal.4th 31-32. Both “knowledge” of the high degree of probability of an injury, and “deliberate disregard” must be alleged. *Id.* Plaintiff has not alleged, and cannot reasonably allege, that Defendants knew that any of their alleged acts would pose a high degree of probability of injury.

To plead “recklessness,” Plaintiff must also plead “acts of egregious **abuse**.” *Delaney, supra*, 20 Cal.4th at 35, explained that:

“‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur [citations]. Recklessness, unlike negligence, involves more than ‘inadvertence, incompetence, unskillfulness, or a failure to take precautions’ but rather rises to the level of a ‘conscious choice of a course of action... with knowledge of the serious danger to others involved in it.’” *Id.* at 31-32.

In “boilerplate” fashion, Plaintiff alleges that Defendants’ engaged in “reckless neglect” in “fail[ing] to provide GERARD DESJARDINS with even the minimum amount of care and services he needed for his health and safety.” [C ¶21, 7:12-14] Plaintiff’s conclusory allegations that Defendants failed to implement unidentified policies and procedures, failed to reprimand unidentified employees for unspecified acts or omissions, failed to provide unspecified training and/or retraining to employees and failed to take other unidentified “reasonable actions” [C 131, 10:1-9], are not sufficient to plead recklessness. The Complaint does not include any factual allegations which indicate that Defendants consciously chose any “course of action with knowledge of the serious danger to others involved in it.” *Delaney, supra*, 20 Cal.4th 31-32. Plaintiff boilerplate allegations are patently insufficient to meet the requirement that all elements of a statutory **Elder Abuse** claim must be pled with particularity. *Covenant, supra*, 32 Cal.4th at 790.

c. Plaintiff Has Not Plead Malice, Fraud Or Oppression.

Acts of simple or even gross negligence will not justify the additional civil damage remedies. *Covenant, supra*, 32 Cal.4th at 783-785. Liability, as well as such reckless, oppressive, fraudulent and/or malicious conduct, must “be proved by a heightened ‘clear and convincing evidence’ standard.” *Covenant, supra*, 32 Cal.4th at 785; *Delaney, supra*, 20 Cal.4th at 35. Thus, as *Covenant, supra*, 32 Cal.4th at 788-789, explained, to obtain the Act’s “heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages.”² The Act’s criteria for malice, fraud or oppression have the same meaning as in [Civil Code § 3294\(c\)](#). *Delaney, supra*, 20 Cal.4th at 31.

The oppressive, fraudulent, or malicious conduct required for recovery under the Act requires ‘intentional,’ willful,’ or ‘conscious’ wrongdoing of a ‘despicable’ or ‘injurious’ nature.” *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 123, citing [Civ. Code §3294\(c\)](#) and *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 721. Plaintiff does not refer to Defendants’ conduct as fraudulent. Plaintiff states only, in conclusory, boilerplate, factually devoid language, that Defendants’ “acts, omissions or conduct” were “willful, despicable, wanton, malicious, oppressive and in conscious disregard of the right and safety of GERARD DESJARDINS.” [C ¶30, 9:25-27] If this single conclusory phrase constitutes an attempt to plead “malice” or “oppression,” it is insufficient to plead a claim for recovery under the **Elder Abuse** Act and/or the punitive damages statute - [Civil Code §3294](#).

C. Plaintiff Has Not Pled Causation.

Plaintiff’s conclusory allegation that Defendants’ collective acts and/or omissions “caused the injuries and damages alleged in the Prayer for Damages” is insufficient to plead causation. [C ¶33, 10:20-22] *Berkeley, supra*, 152 Cal.App.4th at 522, 539, 530.

D. Plaintiff Has Not Pled The “Advance Knowledge,” “Conscious Disregard,” “Authorization” Or “Ratification” Required For An **Elder Abuse** Claim Against An Employer.

[Welfare & Institutions Code § 15657\(c\)](#) provides that:

“The standards set forth in [subdivision \(b\) of Section 3294 of the Civil Code](#) regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney’s fees permitted under this section may be imposed against an employer.”

Civil Code §3294(b) states that:

“An employer shall not be liable for [punitive] damages... based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director or managing agent of the corporation.”

As set forth in California Civil Jury Instruction No. 3102B, an **elder abuse** claim against an employer for enhanced remedies under the Act requires that: (1) the employee who committed the acts was an officer, director, or managing agent of the employer acting on the employer's behalf, (2) an officer, director or managing agent of the employer had advance knowledge of the unfitness of the employee who committed the acts and employed him or her with a knowing disregard of the rights or safety of others, (3) an officer, director, or managing agent of the employer authorized the conduct of the employee who committed the acts or (4) an officer, director or managing agent of the employer knew of the wrongful conduct of the employee who committed the acts and adopted or approved the conduct after it occurred.

As noted above, because **elder abuse** claims are statutory, such claims must be pled with particularity, i.e. with detailed and specific facts. *Covenant, supra*, 32 Cal.4th at 790. “Acts of simple or even gross negligence will not justify the recovery of the additional civil damage remedies” provided by the **Elder Abuse** Act. *Berkley, supra*, 152 Cal.App.4th at 529 (Trial Court did not err in sustaining demurrer to **Elder Abuse** Claim), citing *Covenant, supra*, 32 Cal.4th at 783-785.

As measured against the standards set forth in *Welfare & Institutions Code* § 15657(c) and *Civil Code* §3294(b), Plaintiff's allegations are insufficient to plead a claim for recovery under **Elder Abuse**/Neglect against employers Christian Care and/or George Dogor. Plaintiff has failed to set forth any specific facts sufficient to plead that the requirements of *Welfare & Institutions Code* § 15657(c) for recovery of the enhanced remedies provided by the **Elder Abuse** Act. Therefore, Defendants respectfully request this Court to grant their demurrer to this cause of action without leave to amend.

IV. PLAINTIFF HAS NOT, AND CANNOT, PLEAD A “WILLFUL MISCONDUCT” CAUSE OF ACTION AGAINST CHRISTIAN CARE OR GEORGE DOGOR.

Willful misconduct implies “the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences.” *Williams v. Carr* (1968) 68 Cal.2d 579, 584. The elements which must be pled for a willful misconduct cause of action include: (1) actual or constructive knowledge of the danger, (2) actual or constructive knowledge that injury is a probable result of the danger, and (3) conscious failure to act to avoid the peril. *Nazar v. Rodeffer* (1986) 184 Cal.App.3d 546, 552.

Plaintiff erroneously premises his attempted cause of action for “Willful Misconduct” on the purported “acts of ‘abuse’ and/or ‘neglect’ as defined by the **Elder/Dependent Adult Abuse** Act.” [C ¶38, 11:24-27] The “mere failure to perform a statutory duty is not alone willful misconduct.” *Colich & Sons v. Pac. Bell* (1988) 198 Cal.App.3d 1225, 1242. An act or omission must be specifically described “in order to raise it to the level of willful misconduct.” *Berkley, supra*, 152 Cal.App.4th at 528 (no claim of willful misconduct can be stated without alleging the specific act or omission that caused the injury). As *Snider v. Whitson* (1960) 184 Cal.App.2d 211, 214, explained:

“Where a plaintiff relies upon wilful misconduct there are sound reasons why he should be required to state the facts more fully than in ordinary negligence cases so that it may be determined whether they do constitute wilful misconduct rather than negligence or gross negligence.”

Assuming the truth of Plaintiff's allegations with respect to his attempted willful misconduct cause of action, Plaintiff has not alleged the specific facts required to plead an intentional, conscious act of misconduct. *Id.* Willful misconduct “is not marked by a mere absence of care”; it “involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences.” *Cope v. Davison* (1947) 30 Cal.2d 193, 201. No facts are alleged which show that Defendants engaged in any acts or omissions which they knew would probably cause injury to Plaintiff, as required to plead willful misconduct. *Berkley, supra*, 152 Cal.App.4th at 521-522. Plaintiff has also failed to plead that Defendants consciously failed to act to avoid any danger to Plaintiff. Neither has Plaintiff pled facts which allege any of the other elements of a willful misconduct cause of action. [C ¶¶34-38, 10:24-11:27] Conclusionary allegations or general statements that Defendants acted willfully or maliciously are not insufficient to state a cause of action. *Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd.* (1979) 96 Cal. App. 3d 923, 931 (neither descriptive adjectives nor epithets state a cause of action for intentional or willful misconduct); 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 570, pp. 665-666 (general allegations of willful misconduct insufficient). Therefore, Defendants respectfully request this Court to grant their demurrer to this cause of action without leave to amend.

V. PLAINTIFF HAS NOT PLEAD A “NEGLIGENCE” CAUSE OF ACTION AGAINST CHRISTIAN CARE OR MR. DOGER.

The essential elements of a negligence cause of action include: (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and the plaintiffs injury. *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339. Plaintiff alleges

As in *Berkley, supra*, 152 Cal.App.4th at 527-528, where the Court of Appeal affirmed an order sustaining a demurrer to a “negligence/willful misconduct” cause of action, “there is no description of any particular negligent acts or omissions [engaged in by Defendants] which were allegedly the proximate cause of Plaintiff's injury, only conclusory, boilerplate allegations. [C ¶¶39-42, 12:1-22] Plaintiff has not alleged “facts... explaining how [Defendants'] conduct caused or contributed to [Plaintiffs]” purported injuries. *Berkley, supra*, 152 Cal.App.4th at 528.

Therefore, Defendants respectfully request this Court to sustain their demurrer to Plaintiffs attempted negligence cause of action without leave to amend.

VI. CONCLUSION

Well-reasoned California case law holds that no independent cause of action exists under the **Elder Abuse** Act. In addition, Plaintiff has not alleged the essential elements of his attempted causes of action for **elder abuse**/neglect, willful misconduct and/or negligence causes of action. Therefore, Defendants European Christian Care and George Dogar respectfully request this Court to sustain their demurrer to the Complaint's first, second and third causes of action against them without leave to amend.

Dated: April 19, 2010

CITRON & CITRON

By

JOEL F. CITRON

KATHERINE A. TATIKIAN

Attorneys for Defendants, **EUROPEAN CHRISTIAN CARE; GEORGE DOGAR**

Footnotes

- 1 A true and correct copy of the *Guerard* opinion is attached as Exhibit A.
- 2 *Covenant* compared *Welfare and Institutions Code §15657* which requires “‘clear and convincing evidence that a defendant is liable for’ **elder abuse** and ‘has been guilty of recklessness, oppression, fraud, or malice in the commission of the **abuse**.’” with *Civil Code §3294(a)* which requires clear and convincing evidence’ that the defendant has been guilty of oppression, fraud, or malice.” *Id.*

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